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In the Supreme Court of the United States

OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a corporation can be criminally liable for a conspiracy to defraud the United States, in violation of 18 U.S.C. 371, where all the co-conspirators are employees of the corporation.

2. Whether petitioner's conspiracy conviction should have been reversed because an alleged co-conspirator was acquitted at the same trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 20 F.3d 974. The opinion of the district court denying petitioner's motion for judgment of acquittal or a new trial (Pet. App. 14a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1994. A petition for rehearing was denied on May 13, 1994. Pet. App. 13a. The petition for a writ of certiorari was filed on August 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner, a corporation, was convicted of conspiracy to defraud the United States and to make false statements to a government agency, in violation of 18 U.S.C. 371. Petitioner was fined $3,500,000. The court of appeals affirmed (Pet. App. 1a-12a).

1. Petitioner manufactures and sells sophisticated electronic parts and equipment. Between 1985 and 1988, petitioner's Microelectronic Circuits Division (MCD) produced microelectronic circuits called hybrids under contract to the Department of Defense. Hybrids perform a variety of critical roles in the integral electronic works of missiles and weapons systems. The Department of Defense contract required that each hybrid pass a series of tests before shipment and that MCD maintain records of the tests or processes performed on the hybrids. Gov't C.A. Br. 4-6.

Donald LaRue was a general supervisor in the environmental test area of a manufacturing floor of MCD. The evidence at trial showed that LaRue and his superiors, Jim Temple and Frank Saia, agreed to eliminate certain tests and to falsify the results of others. For instance, LaRue instructed his employees not to reject on paper the hybrids that had failed "leak" tests. Further, LaRue instructed employees to "sign off" on records for thousands of hybrids even though the employees had not conducted the tests and did not have knowledge of the actual test results. When Margaret Goodearl, a supervisor in the MCD environmental test area, complained that MCD was not complying with the government contract, Temple warned Goodearl that she was not "part of the team." Likewise, Saia told Goodearl

that if she ever complained again, he would "fire her ass." Gov't C.A. Br. 4-12.

Petitioner and LaRue were jointly tried on two substantive false statement counts and a count charging conspiracy to defraud the United States. At the close of the evidence, the district court instructed the jury that to convict on the conspiracy charge, the jury would have to find that "LaRue and [petitioner], [petitioner] acting through LaRue, and at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby, were members of the conspiracy." Pet. App. 31a. The jury found petitioner guilty on the conspiracy count and not guilty on the two substantive counts. The jury acquitted LaRue on all three counts. *Id.* at 2a-3a. The district court thereafter denied petitioner's post-verdict motion for a judgment of acquittal, holding that despite the "stark inconsistency" (*id.* at 28a) of the verdict, LaRue's acquittal did not provide a basis for setting aside petitioner's conspiracy conviction. *Id.* at 14a-28a.

2. The court of appeals affirmed. Pet. App. 1a-12a. The court held that a conspiracy verdict may not be set aside on grounds of inconsistency. *Id.* at 3a-6a. Quoting *United States* v. *Powell*, 469 U.S. 57, 68-69 (1984), the court explained: "[T]he Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggest that the best course to take is simply to insulate jury verdicts from review on [inconsistency] ground [*sic*]." Pet. App. 5a. Accordingly, the court concluded, "the conviction of one co-conspirator is valid even when all the other co-conspirators are acquitted." *Id.* at 5a-6a.

The court also rejected petitioner's argument that it could not be convicted of conspiracy based entirely on the

acts of its employees. The court held that the language of 18 U.S.C. 371, which states that if "two or more persons conspire," each shall be punished, "does not exclude criminal liability for a corporation simply because its employees are the actual conspirators." Pet. App. 7a. The court further held that petitioner was not helped by the rule of lenity. The court explained that the rule could not be used "in complete disregard of the purpose of the legislature" (*ibid.*, quoting *Perrin* v. *United States*, 444 U.S. 37, 49 n.13 (1979)), and that petitioner's interpretation of the general conspiracy statute was "implausible and would undermine the purpose of the statute." Pet. App. 7a. The court declined petitioner's invitation to extend the "intracorporate conspiracy doctrine in antitrust law" to this criminal case. *Id.* at 8a. The court also rejected as "illogical" the public policy arguments proffered by petitioner in support of such an extension. *Id.* at 8a-9a. Finally, the court held that petitioner's conviction did not violate Wharton's Rule, which prevents a conspiracy conviction when an underlying substantive offense, such as adultery or dueling, requires more than one actor. The court pointed out that a single employee could defraud the United States or submit false statements to a government agency—the objects of the conspiracy in this case. *Id.* at 9a.

ARGUMENT

1. The court of appeals correctly rejected petitioner's argument that a corporation cannot be held liable under 18 U.S.C. 371, the general criminal conspiracy statute, for a conspiracy among its employees on the corporation's behalf. Contrary to petitioner's claim, the decision below is consistent with the decisions of every other circuit to have addressed the issue.

Section 371 provides that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy," each shall be punished by fine or imprisonment. Petitioner does not dispute that a corporation may be held liable under Section 371 for the acts of its employees where the employees conspire with someone outside the corporation. See Pet. 9, citing *Joplin Mercantile Co.* v. *United States*, 213 F. 926, 936 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915). Nor does petitioner dispute that employees of a single corporation violate Section 371 when they conspire with each other to defraud the United States. See Pet. 9-10, citing *Cohen* v. *United States*, 157 F. 651, 653-654 (2d Cir.), cert. denied, 207 U.S. 596 (1907); see also *United States* v. *Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984). And petitioner concedes that a corporation can be held liable for an intra-corporate conspiracy where at least one employee was acting for his "own ends." Pet. 9, citing, *inter alia*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 & n.15 (1984).

Petitioner nevertheless contends that a corporation escapes liability under Section 371 if all the conspiratorial acts are committed by employees of the corporation acting on the corporation's behalf. But the plain language of Section 371 does not support such a distinction. As long as there are two individual co-conspirators, as there were in this case,[1] the "two or more persons" requirement of Section 371 is satisfied.

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[1] The district court instructed the jury that it could not convict petitioner of conspiracy unless it found that LaRue and at least one of the unindicted co-conspirators were members of the conspiracy. Pet. App. 31a.

See Pet. 7. In such a case, the element of plurality is satisfied even if the corporation "stand[s] in the shoes" of each member of the conspiracy. See Pet. 6.[2] A corporation is vicariously liable for the corrupt actions of each employee who acts on the corporation's behalf. Neither the language of Section 371 nor its statutory purpose of punishing concerted action to defraud the United States suggests that Congress intended to insulate the corporation from liability where every co-conspirator is a corporate employee. As the First Circuit has held, in rejecting the "syllogism" that because acts of corporate officers constitute acts of the corporation, a corporation cannot conspire with its officers because to do so would amount to "conspir[ing] with itself,"

> [t]here is a world of difference between invoking the fiction of corporate personality to *subject* a corporation to civil liability for acts of its agents and invoking it to *shield* a corporation or its agents from criminal liability where its agents acted on its behalf.

United States v. *Peters*, 732 F.2d at 1008 n.7; see also *United States* v. *Stevens*, 909 F.2d 431, 432-433 (11th Cir. 1990) (rejecting "'single entity' theory that all agents of a corporation engaging in corporate conduct form a single, collective legal person").

Petitioner faults (Pet. 6-8) the court below for failing to interpret Section 371 in light of the common law of conspiracy. Petitioner, however, has not pointed to any

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[2] In this case, the district court instructed the jury that to convict petitioner, the jury had to find that the corporation "act[ed] through LaRue." Pet. App. 31a. Accordingly, on the record in this case, petitioner's liability did not rest on a finding that the corporation stood in the shoes of "each" co-conspirator. See Pet. 6.

common law support for its argument. Instead, petitioner notes only that conspiracy has traditionally required a "plurality" of actors. Pet. 7. Petitioner's argument would have more force if it had been convicted of conspiring with LaRue alone. See *United States* v. *Stevens*, 909 F.2d at 432-434 (reversing conspiracy conviction where there was "only one human actor, acting for himself and for the corporate entity which he control[led]"). But the jury instructions in this case eliminated that possibility; the instructions required the jury to find that LaRue conspired with at least one other natural person—one of the unindicted co-conspirators—thereby satisfying the long-established "element of plurality." See Pet. 7.

The courts of appeals have uniformly rejected petitioner's argument that a corporation is not accountable under Section 371 for the conspiratorial acts of its employees unless there is at least one noncorporate member of the conspiracy. See, *e.g.*, *United States* v. *Ames Sintering Co.*, 927 F.2d 232, 236-237 (6th Cir. 1990); *United States* v. *Peters*, 732 F.2d at 1007-1008 & n.7; *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), cert. denied, 464 U.S. 935 (1983); *United States* v. *Hartley*, 678 F.2d 961, 970-972 (11th Cir. 1982) (dictum), cert. denied, 459 U.S. 1170 and 1183 (1983); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1258 n.120 (3d Cir. 1978) (en banc) (dictum), vacated on other grounds, 442 U.S. 366 (1979); *Mininsohn* v. *United States*, 101 F.2d 477, 478 (3d Cir. 1939) (affirming Section 371 conviction of corporation and its two officers without discussing absence of any noncorporate co-conspirators). See also *United States* v. *Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986) (affirming conviction of medical clinic for conspiracy among its employees to distribute controlled substances

(21 U.S.C. 846)); *United States* v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (affirming corporation's conviction for conspiracy between manager and employee to disconnect automobile odometers (15 U.S.C. 1986)); *United States* v. *American Grain & Related Industries*, 763 F.2d 312, 320 (8th Cir. 1985) (corporation can be held liable for intra-corporate conspiracy to violate Commodity Credit Corporation Charter Act (15 U.S.C. 714m(d)).

United States v. *Notarantonio*, 758 F.2d 777 (1st Cir. 1985), on which petitioner relies (Pet. 11), does not conflict with these decisions. In that case, the court of appeals affirmed the conspiracy convictions of a corporation, an employee of the corporation, and a second individual who worked elsewhere. The court noted that the "plurality of actors necessary to establish a conspiracy [was] present despite the fact that [the employee] and the [corporation] could not by themselves constitute a conspiracy." 758 F.2d at 789. Accordingly, the court did not reach the question whether the corporation would have been liable if it had employed both of the individual co-conspirators. Because the First Circuit answered that question affirmatively in *Peters*, the First and Ninth Circuits agree on the answer to the question presented here.

Petitioner relies on case law holding that Section 1 of the Sherman Act, 15 U.S.C. 1, does not apply to intra-corporate or intra-enterprise conspiracies. See Pet. 12, citing, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). But this Court rested its decision in *Copperweld* on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See

Copperweld, 467 U.S. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, this Court held in *Copperweld* that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. 467 U.S. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."). Petitioner does not suggest, however, that in enacting Section 371, Congress likewise intended to leave unchecked a corporation's ability to defraud the United States through the concerted actions of its employees. There is therefore no basis for engrafting an intra-corporate exception onto the broad language of Section 371. See *United States* v. *Stevens*, 909 F.2d at 432 (distinguishing antitrust context in which "the single entity theory first arose"); *United States* v. *Ames Sintering Co.*, 927 F.2d at 236 (same).[3]

Petitioner's reliance on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, is equally misplaced. See Pet. 14-16. Section 1962 proscribes a series of offenses committed by "any person" who conducts or participates in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity. The courts of appeals have held that the liability of the "enterprise" or corporation turns on the language used in the subsections of Section 1962 to define each particular offense. See *Busby* v. *Crown*

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[3] As the court of appeals noted in rejecting petitioner's identical claim, "[i]f we applied the intracorporate conspiracy doctrine to this case, no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy. This result is illogical." Pet. App. 8a-9a.

Supply, Inc., 896 F.2d 833, 840-841 (4th Cir. 1990) (en banc) (observing that most circuits have held that the "enterprise" can violate subsection (a) but not subsection (c)).[4] See also *Ashland Oil, Inc.* v. *Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (a corporation and its employees can violate subsection (c) if they have conspired to conduct the affairs of a separate enterprise through a pattern of racketeering activity). Because the rationale of these cases is dependent on the statutory language, and because the RICO statute is strikingly different from Section 371, the general criminal conspiracy statute, the RICO decisions have little, if any, relevance to petitioner's conviction.

Nor is review warranted here in order to settle the question whether the intra-corporate conspiracy doctrine applies to civil rights suits filed under 42 U.S.C. 1985(3). See Pet. 13 & n.7.[5] Whatever the proper

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[4] Section 1962(c) states that "[i]t shall be unlawful for any person employed by or associated with any enterprise * * * to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Based on that language, all but one circuit has held that the "person" who violates the provision must be distinct from the "enterprise." See *Busby*, 896 F.2d at 840 & n.7. Compare *United States* v. *Hartley*, 678 F.2d at 988 ("A corporation may be simultaneously both a defendant and the enterprise under RICO.").

[5] Some courts have held that "managers of a corporation jointly pursuing its lawful business do not become 'conspirators' [under § 1985] when acts within the scope of their employment are said to be discriminatory or retaliatory." *Hartman* v. *Board of Trustees of Community College District No. 508*, 4 F.3d 465, 469 (7th Cir. 1993), quoting *Travis* v. *Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 110 (7th Cir. 1990), cert. denied, 112 S. Ct. 60 (1991). Accord *Herrmann* v. *Moore*, 576 F.2d 453, 459 (2d Cir.), cert. denied, 439 U.S. 1003 (1978); *Buschi* v. *Kirven*, 775 F.2d 1240,

resolution of that question, it is clear that Congress has the authority to impose liability on a corporation for the unlawful, conspiratorial acts of its employees. Whether Congress has done so in the civil rights, antitrust, or RICO statutes sheds little light on whether petitioner was properly convicted under Section 371. Because petitioner has failed to show that its intra-corporate conspiracy claim would have prevailed in any circuit, the judgment below does not warrant further review.

2. Petitioner also contends (Pet. 17) that the court of appeals should have reversed its conspiracy conviction because the same jury acquitted LaRue, "an indispensable party to any such conspiracy." But the law is settled that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981) (per curiam). That principle was first enunciated in *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932), and has "stood without exception in this Court" ever since. *United States* v. *Powell*, 469 U.S. 57, 69 (1984). See also *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). The *Dunn* rule has been applied by the Court "with respect to inconsistency between verdicts on separate charges against one defendant, and also with respect to verdicts that treat codefendants in a joint trial inconsistently." *Harris*, 454 U.S. at 345 (citation and footnote omitted). The rule precluding review of

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1252 (4th Cir. 1985); *Hull* v. *Cuyahoga Valley Joint Vocational School District Board of Education*, 926 F.2d 505, 509 (6th Cir.), cert. denied, 501 U.S. 1261 (1991); *Richmond* v. *Board of Regents of University of Minnesota*, 957 F.2d 595, 598 (8th Cir. 1992). Others have refused to apply the intra-corporate conspiracy doctrine where the corporation and its employees engaged in more than "a single act" of discrimination. *Stathos* v. *Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (Breyer, J.); *Novotny*, 584 F.2d at 1256-1259.

inconsistent verdicts is founded on the recognition that a jury's acquittal may result not from a failure of proof, but from "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65; see also *Dunn*, 284 U.S. at 394. The rule also reflects the practical reality that, as a result of double jeopardy considerations, the government is precluded from seeking review of the unfavorable aspects of inconsistent jury verdicts. *Powell*, 469 U.S. at 65. Under these circumstances, to permit defendants to void inconsistent verdicts would create a one-way ratchet benefitting defendants—despite the possibility that the acquittal portion of the inconsistent verdict was already a "windfall" bestowed by a jury "convinced of guilt." *Ibid.*

The rule of *Dunn* applies with full force in the conspiracy context. Much as it would be "pure speculation" (*Powell*, 469 U.S. at 66) to assume that an acquittal of one of two identically situated co-defendants in a joint trial where the other defendant was convicted reflects the jury's "true" verdict, it would be "pure speculation" to assume that the acquittal of a co-conspirator signifies a jury's conclusion that no conspiracy existed between that defendant and his convicted co-conspirator. The acquittal could equally well reflect the jury's "mistake, compromise, or lenity." *Id.* at 65. Such speculation is in any event unnecessary. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67. Significantly, petitioner does not challenge the sufficiency of the evidence against it in this case.

Petitioner errs when it states (Pet. 19) that since *Dunn*, this Court has "recognized and applied" a contrary rule requiring verdict consistency in con-

spiracy cases. Petitioner relies principally on *Hartzel* v. *United States*, 322 U.S. 680 (1944), but that case did not involve an inconsistent verdict; on the contrary, the jury returned guilty verdicts against the defendant and his two alleged co-conspirators. *Id.* at 682 n.3. The Court set aside the defendant's conspiracy conviction because the verdicts against his co-defendants, his sole alleged co-conspirators, had been set aside by the lower courts on the ground that the evidence of their guilt was legally insufficient. The Court concluded, based on the lower court rulings, that the evidence was therefore insufficient as a matter of law to show that any conspiracy existed. *Ibid.* Indeed, with the exception of *Harris* v. *Rivera*, *supra*, none of the cases relied on by petitioner involved an inconsistent verdict. See *Morrison* v. *California*, 291 U.S. 82, 93 (1934); *United States* v. *Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring in the result); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 246 (1940); see also Pet. App. 3a n.4 (distinguishing *Hartzel* and *Morrison* as not involving inconsistent jury verdicts). In *Harris*, the Court upheld the defendant's conviction even though the trial judge had inexplicably acquitted an identically situated co-defendant during the same bench trial. The Court did not suggest that the result would have been different had the charge been conspiracy. Although the Court cited *Hartzel* with approval, see 454 U.S. at 345 n.13, the Court was careful to point out that in *Hartzel* the trial court had set aside a jury's consistent verdict of convictions. Accordingly, none of these decisions undermines the accuracy of this Court's pronouncement in *Powell*: "The rule established in *Dunn* v. *United States* has stood without exception" since 1932, and it should "remain that way." 469 U.S. at 69.

Since this Court's decision in *Powell*, every court of appeals that has squarely considered whether the *Dunn* rule extends to conspiracy verdicts has held that it does. *United States* v. *Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992) (en banc); *United States* v. *Bucuvalas*, 909 F.2d 593, 595-597 (1st Cir. 1990); *United States* v. *Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States* v. *Andrews*, 850 F.2d 1557, 1561-1562 (11th Cir. 1988) (en banc), cert. denied, 488 U.S. 1032 (1989); *United States* v. *Valles-Valencia*, 823 F.2d 381, 382, amending 811 F.2d 1232 (9th Cir. 1987). Other courts, citing this Court's decision in *Powell*, have expressed grave doubts about the continuing validity of any "rule of consistency" exception in conspiracy cases to the inconsistent-verdict rule. See, *e.g.*, *Cortis* v. *Kenney*, 995 F.2d 838, 840-841 & n.2 (8th Cir. 1993); *United States* v. *Mancari*, 875 F.2d 103, 104-105 (7th Cir. 1989); *United States* v. *Dakins*, 872 F.2d 1061, 1065-1066 (D.C. Cir.), cert. denied, 493 U.S. 966 (1989); *Government of Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *id.* at 142-143 (Garth, J., concurring); see also *United States* v. *Garcia*, 882 F.2d 699, 704-705 (2d Cir.) (citing *United States* v. *Andrews*, *supra*), cert. denied, 493 U.S. 943 (1989).

Contrary to petitioner's suggestion (Pet. 21-22), neither the Sixth Circuit nor the Tenth Circuit has charted a different course. In *United States* v. *Boling*, 884 F.2d 924, amending 869 F.2d 965 (6th Cir. 1989), cert. denied, 493 U.S. 1082 (1990), on which petitioner relies (Pet. 21-22), a jury convicted both co-conspirators (Lauback and Boling). The Sixth Circuit thereafter vacated Boling's conviction and remanded for a new trial on the ground that her attorney was disabled by a conflict of interest. The court vacated Lauback's conviction as well, explaining that Lauback was entitled to this "windfall" because Boling was his only indicted

co-conspirator. The court further held that if either Boling or Lauback was found not guilty at the retrial, "the conviction of the other may not be upheld." 869 F.2d at 973.

On rehearing, the Sixth Circuit reinstated Lauback's conspiracy conviction. In so doing, the court noted that it had previously criticized the rule of consistency for conspiracy verdicts. *United States* v. *Boling*, 884 F.2d at 925, citing *United States* v. *Sandy*, 605 F.2d 210, 215 (6th Cir.), cert. denied, 444 U.S. 984 (1979). Ultimately, however, the court did not resolve the question whether conspiracy verdicts must be consistent where all known co-conspirators are tried together, because settled circuit law established that even if Boling were acquitted at the retrial, an acquittal of the sole co-conspirator at a separate trial would not furnish a basis for vacating Lauback's conspiracy conviction. 884 F.2d at 926, quoting *United States* v. *Sachs*, 801 F.2d 839, 845 (6th Cir. 1986).

Likewise, the Tenth Circuit has not yet considered whether, in the aftermath of *Powell*, conspiracy verdicts must be consistent. See *United States* v. *Sasser*, 974 F.2d 1544, 1560-1561 & n.8 (10th Cir. 1992) ("Because we conclude that this case does not present us with a situation where we have inconsistent verdicts, we do not address whether *Powell* overrules [circuit precedent establishing rule of consistency]."), cert. denied, 113 S. Ct. 1063 (1993); *United States* v. *Howard*, 966 F.2d 1362, 1363-1364 (10th Cir. 1992) (declining to decide the issue "until we have before us a case in which all alleged coconspirators are tried together by a jury and all but one are acquitted"); *United States* v. *Suntar Roofing, Inc.*, 897 F.2d 469, 475-477 (10th Cir. 1990) ("the facts of this case do not demand the resolution of" that issue). In both *Suntar Roofing* and *Howard*, the evidence showed

that the defendants had conspired with individuals other than their acquitted co-defendants.[6] In *Sasser*, the jury failed to reach a verdict on the guilt of the co-conspirators. Consequently, in each of the Tenth Circuit cases cited by petitioner (Pet. 21), the verdict was not inconsistent. Because there is no live circuit conflict at this time, further review of petitioner's inconsistent verdict claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] In the instant case, the evidence also showed that there were several co-conspirators. Although petitioner's conviction should not therefore have depended on LaRue's participation in the conspiracy, the district court instructed the jury that it could not convict petitioner or LaRue unless it found that LaRue "and at least one of the unindicted co-conspirators * * * were members of the conspiracy." Pet. App. 31a. In light of that instruction, the verdict can fairly be characterized as inconsistent.